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# Supreme Court of the United States

## OCTOBER TERM, 1947

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**No. 321**

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LELA MAE BENSON, ADMINISTRATRIX,
*Petitioner,*

*v.*

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS,
*Respondent.*

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# PETITIONER'S REPLY BRIEF

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WARLICK LAW PRINTING CO., INC.—*Law Brief Printing*—Dallas, Texas—Harwood-9350

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*May It Please the Court:*

Petitioner regrets the necessity of challenging statements made in the brief for respondent at page 17, where it is said:

> "*The uncontroverted evidence reflects that deceased's body was being pushed or dragged from the west toward the cattle-guard for a distance of 24 feet.*"

And

> "*That his body was at least 64½ feet west of the cattle-guard when found.*"

1. The basis, and the only basis, for the statement that the uncontroverted evidence reflects that "deceased's body was being pushed or dragged from the west toward the cattle-guard for a distance of 24 feet," is testimony of two of respondent's witnesses, that they found the grass mashed

down for that distance, and more noticeably mashed at the end of the 24 feet.

The undisputed evidence is that the engine stood on this side track until 15 minutes after 4 o'clock; that at least four persons, the surviving members of the train crew, had walked to and fro along the train at said point, and had mounted, and dismounted from, the engine, and it is more probable, at least as probable, that the grass was mashed down by these persons, than by the body of deceased. If, as claimed, it appeared that the grass at the end of the 24 feet, and adjacent to the switch track, seemed to have been mashed down more, it is easily accounted for by the fact that this point is where these persons would converge at and about the engine. Incidentally, it is inconceivable that the mere resting of the body at any point for the time it did rest there would have made a difference in the appearance of the grass sufficient to be noticeable.

Upon this testimony as to the appearance of the grass, and nothing else, they assert that it is uncontroverted that the body was pushed or dragged from the west toward the cattle-guard, apparently in support of a theory that deceased was struck and killed by the eastbound train.

But this evidence if it may be said to have the dignity of evidence, is controverted and shown to be without substance, if it is not conclusively rebutted, by respondent's own witness, Glover, the engineer of the eastbound train, whose testimony is set out at pages 28 to 30 of the petition, and more briefly at page 81 of petitioner's brief.

It is further controverted by the fact undisputed, that there was no object at the point where the grass was mashed down, and where it is claimed deceased's body was being pushed or dragged from the west toward the cattle-guard, which could have cut his trousers into strips, as they were cut, or caught and pulled or twisted the heel from his shoe, as it was pulled or twisted. (R. 25.)

2. There is no semblance of justification or excuse for the statement that "the uncontroverted evidence reflects that the body was at least 64½ feet west of the cattle-guard when found."

Apparently, the basis for this statement is the testimony of Keel, who *estimated* the distance westward from the cattle-guard to the body as 65 or 75 feet, and the distance from the gravel road to the cattle-guard, shown to be 458 *feet*, as *300 or 400 yards*; and the testimony of Lytle and Morrison, that from the west switch point to the cattle-guard was 418 feet; that the beginning point where the grass was mashed down was 330 feet, and from that point to the point where the grass was more mashed was 24 feet, making 354 feet which, subtracted from the total distance of 418 feet, would leave 64 feet.

But the testimony of petitioner and the finding of the Court of Civil Appeals in the first part of its opinion is that the distance between the west switch point and the stock guard was, not 418 feet, but 366 feet, 52 feet less. When this 52 feet is deducted from the 64½ feet, it will be seen that it places the body 12 feet west of the stock guard, so that even without the testimony of Stitzel and the

finding of the Court of Civil Appeals as next set out, the statement that the position of the body was uncontroverted is baseless.

But the testimony of Stitzel, respondent's engineer in charge of the westbound train, places the body "at or near a cattle-guard." And his testimony is not only unimpeached, but is in harmony with the testimony of other members of the train crew, when their testimony as to distances, which are estimates, is applied to measurements on the ground. Not only so, but the Court of Civil Appeals itself finds and says in so many words that the testimony of Stitzel appears to place the body "at or near a cattle-guard." (R. 48.) *200 Southwestern Reporter, Second Series, page 237, Col. 2.*

At the bottom of page 16, referring to the cattle-guard, it is stated that respondent was required by law to maintain it.

If this suggestion is presented as a defense, it is a sufficient answer to say that there is nothing in the law which required or permitted respondent to allow this instrumentality to become overgrown and covered and concealed by weeds and grass and vines, as shown by exhibits at pages 76 and 77 of the Record, and by the testimony of petitioner at page 21, and of the witness Moore at pages 21 and 22. Thus to maintain it was negligence. *G. H. & S. A. Ry. Co. v. Slinkard (Tex. Civ. App., writ of error refused), 44 S. W. 35; Fedenberg v. Ry. Co., 114 N. Y. 582, 11 Am. St. Rep. 697, 21 N. E. 1047.*

Indeed, it may be said that the switch track should not have been located in this place, if that location made a cat-

tle-guard necessary, since the record shows it could have been located wholly east or west of either of the crossings shown. *Ford v. Chicago, etc. R. Co. (Ia.), 24 L. R. A. 657*, where it is said (syllabus):

> "A railroad company, although required by law to erect and maintain a cattle-guard at a certain point, must make it safe as a crossing for employees, if it so locates its switch yards that they are constantly required to cross it."

And where *(page 664)* it is said:

> "We may properly say that no switch yards should be so located, if it is practicable to avoid it, as to require employee, in the switching of cars, to cross and recross a cattle-guard."

At page 18 of respondent's brief it is said that the jury has found that deceased was performing no "specific" duty at the time of his death.

The duties of the deceased with reference to the westbound train began when he was called to go out with it—the first forward movement he made to serve in the traffic, and they were upon him in connection with the movement of the train from the point of origin to the point of destination. They were continuous as a matter of law, at least in the absence of an affirmative showing that he had abandoned his connection with the train en route.

*North Carolina R. Co. v. Zachary, 232 U. S. 246; 58 L. Ed. 591; Lamphere v. Ore. R. Co., 196 F. 336; McKay v. Monongahela R. Co., 44 F. (2d) 150; Virginia Ry. Co. v. Early (C. C. A.), 130 F. (2d) 548; Nicholas v. Reading Co. (Pa.), 24 Atl. (2d) 63; San Pedro, etc. R. Co. v. Davide*

*(C. C. A.), 210 F. 870; Alabama, etc. R. Co. v. Stotzy (Ala.), 71 S. 335; Glunt v. Pa. R. Co. (Pa.), 95 A. 109 (citing Pederson v. Ry., 57 L. Ed. 1125; Ann. Cas. 1914C, 153.)*

He was on the premises of respondent where he was required to be in order to perform the specific duty of cutting or assisting in the cutting of the train at the road crossing, or giving any necessary signal, and, as found by the jury in answer to Issue No. 1, which was an ultimate and controlling issue, was, at the very time of his death in the performance of his duties in connection with the operation and movement of the westbound train, upon which he was brakeman. (R. 37.)

It was not required that, in order to be protected against the negligence of respondent, he should be engaged in actually giving a signal or pulling a draw bar or in doing any other specific thing. It was enough that he was there in the performance of his duties *for the purpose* of doing one or all of these or any other specific things.

The issue as to a specific act was evidentiary and not ultimate and in any event, not of a nature to form the basis of a judgment.

WHEREFORE, petitioner prays as in her petition.

Respectfully submitted,

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